No. 20067

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

SUE F. GEORGE, *Appellant*

vs.

NEW YORK LIFE INSURANCE COMPANY, a Mutual Insurance Company, *Appellee*

On Appeal From The United States District Court For The Eastern District Of Washington, Northern Division.

BRIEF OF RESPONDENT

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I.

APPELLANT'S SPECIFICATIONS OF ERROR

We print as an Appendix to this Brief, for the convenience of this Court, the concise yet complete Opinion of the Trial Court (Tr. 9-14). This consists of seventeen numbered findings.

Appellant excepts to ten of these Findings of Fact. It is worthy of note, however, that appellant does not except to Finding IX or to Finding XVI.

Finding No. IX recites that:

> "There is no evidence that the decedent slipped or fell accidentally."

Finding No. XVI recites:

> "There is no proof of death by external, violent or accidental means."

Bearing in mind that this is a double indemnity policy, that the sum of Fifty Thousand Dollars ($50,000.00) has been voluntarily paid to the appellant on the life provisions of the policy, and that only the double indemnity provision for payment is here in dispute, we call attention to the specific provision of the policy, which provides for payment only:

> "in the event the death of the insured resulted directly from injury effected solely through external, violent and accidental means."

Thus, a finding, unexcepted to, "that there is no proof of death by external, violent or accidental means" would seem to be fatal to this appeal.

Further, we bear in mind the familiar rule on appeal prescribed by 28 U.S.C.A., Rule 52a, which provides:

> "Findings of Fact should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of witnesses."

We remember, too, that this Court has often had occasion to apply this section of the Code of Civil Procedure, saying, only last year, in *Kerr v. C.I.R.*, 326 F. (2d) 225:

> "Findings of Trial Judge will be sustained unless clearly erroneous, or unless not supported by substantial evidence."

Two later cases by this Court applying the same rule are:

Monroe Auto Equip. Co. v. Superior Industries, Inc., 332 F. (2d) 473
Wells-Benz, Inc. v. U.S., 333 F. (2d) 89.

Furthermore, it will be noted that appellant, in her brief, nowhere undertakes the heavy burden of showing that any one of these ten Findings of Fact is "clearly erroneous," or not supported by substantial evidence. Under these circumstances, these Findings of Fact stand as the facts of this case, and conclusively demonstrate that appellant cannot recover.

We have every confidence that each of the Trial Court's findings are supported by a substantial preponderance of the evidence. We refer to these matters merely to lighten the burden of this Court in examining the record.

II.

ADDITIONAL STATEMENT OF THE CASE

Appellant's Statement of the Case, so far as the facts are concerned, consists of a single sentence advising the Court that

> "Henry S. George was found dead on or about, June 24, 1963, in the bath room of a hotel room in Spokane, Washington, where he made his home."

To this should be added the following further facts that negative the claim that appellant's decedent met his death by "external, violent and accidental means."

Decedent's body was found lying crosswise in the bathroom, with his head against the bathroom wall, and his feet resting against the bathtub (R. 18-19). Decedent had a cigarette between the first and second fingers of his right hand (R. 19). This position of the cigarette had not been disturbed by the fall, and it continued to burn after the fall until it accumulated an inch of ash (R. 217, 244), indicating the moveless condition of the body, due to rigor mortis.

There was no foreign material on the floor of the bathroom, and its floor was dry, so that there was no evidence that decedent had slipped or fallen. Unable to offer evidence showing that decedent had slipped, appellant's chief medical witness testified that decedent

". . . was a sick man. He may have been dizzy or fainted. I don't know." (R. 67).

This is as close as appellant was able to come to the cause of decedent's fall. The great preponderance of the evidence is that the decedent died of natural causes, and was dead at or before the time his body hit the floor. (R. 124, 151-2, 161, 180, 215).

Further facts will be set forth in the course of the argument.

III.

ARGUMENT

As we read appellant's brief, we find in it only contentions of fact, two in number: first, the contention that decedent met his death by external violent and accidental means; and second, that appellee failed to show by a preponderance of the evidence that the decedent died from natural causes.

1. Was Decedent's Death Caused by External, Violent and Accidental Means?

For the proof that decedent's death was the result of external, violent and accidental means, appellant relies on just two non-significant circumstances: One, a discoloration or bruise just below the right jaw, the discoloration extending into the lower part of the face that first came into existence the day after decedent's death; and second, a distorted version of an exclama-

tion made by Dr. Kalez immediately on seeing the dead body of decedent in the bathroom when he exclaimed that decedent "could have fallen and broken his neck, or he could have had a stroke or a heart failure." (R. 24)

This off-hand remark about a broken neck, as one of three possibilities, was shown to have no pertinence here since his neck was not broken or injured in any way. Yet, counsel harps on it in his brief to show "violent and accidental means."

As to the discoloration or bruise, at the time of the discovery of the dead body of decedent, Mr. George, the elder brother of decedent, Dr. Kalez, and a little later, the Coroner, all examined the head and upper part of the body quite carefully and discovered no bruise or discoloration at that time. It was only on the day following the discovery of the body when it was at the mortuary, that Mr. George discovered it for the first time. (R. 108). Mr. Hayes, of the mortician staff, described it as a "discoloration," "mottled" and said "it could look like a bruise" (R. 225). He explained its appearance the day afterwards by saying:

> "To us, it looked like the head had been in a position as such and there is where the blood went to." (R. 224-226)

Dr. Kalez gave a similar explanation of this later appearance of discoloration by testifying:

> "It could be just due to pooling of the blood in a portion of the neck post mortem — I mean, after death." (R. 154).

Not only did Mr. George not see this discoloration or bruise on the day of the accident, but the Deputy Coroner, Dr. Higgins, who examined the body carefully within a few hours of its discovery on the 24th of June, after explaining his duty to make such a careful examination, testified as follows:

> "I looked at the patient's head and neck and exposed parts to see if I could see any signs of contusion or lacerations, bruises, hemorrhages, or any sign of external violence, which I could not." (R. 213).

Similarly, Dr. Kalez, one of the first to see the body of the decedent, also made a close examination of the body at that time. He testified that he looked at the face and the jaw, that he would have seen the discoloration "if it would have been sufficient to have been seen," and that there was "no sign of any bruise" (R. 154).

Thus, this attempt of appellant to rely on this so-called "bruise" or this exclamation that the decedent's neck might have been broken when it wasn't — "as evidence of violent and accidental means" simply vanishes into thin air. Therefore, Finding of Fact No. 16, that there is no proof of death by external, violent or accidental means, is fully supported by the uncontradicted testimony.

In support of their contention that Dr. Kalez' exclamation about the possibility of a broken neck and the discoloration of the right jaw that took place at least a full day after the death of the decedent, constituted external, violent and accidental means of the death, appellant cites two Washington cases: The first of these, *Hodgkinson vs. Department of Labor and Industry,* 52 Wash. (2d) 500, 326 P. (2d) 1008, defined the word, "injury" in a Workmen's Compensation case in such general terms as to have no meaning or application here.

The other case is *Hill vs. Great Northern Life Insurance Co.,* 186 Wash. 167, 57 P. (2d) 405, cited merely to quote a statement of the rule in *Horsfall vs. Pacific Mutual Life Ins. Co.,* 32 Wash. 132, 72 Pac. 1028.

But the *Horsfall* case, even if it were applicable here, was overruled in *Evans vs. Metropolitan Life Ins. Co.,* 26 Wash. (2d) 594, 622; 174 P. (2d) 961. In a thirty-five (35) page opinion, the *Evans* case exhaustively reviewed all the earlier cases of the Washington Supreme Court in this field to remove inconsistencies in their earlier cases, achieving this by distinguishing certain of the cases and by directly overruling the *Horsfall* case, as well as *Bennett vs. Mutual Trust Life Ins. Co.,* 21 Wn. (2d) 698; 152 P. (2d) 713. In so distinguishing and overruling certain of its earlier cases, it laid down a rule that, under such a policy as is here involved:

> "It is not sufficient to establish a direct, causal connection between the accident and the injury, but he must show that the resultant condition was caused solely by an accidental means; and if the proof shows a pre-existing infirmity which was a *contributing* factor, he cannot recover." (Emphasis supplied).

As we have heretofore pointed out, Dr. Hill, on whose testimony plaintiff must rely, in answer to an inquiry as to a written statement he had made, describing the cause of death of Henry George, Dr. Hill admitted, "Yes, it [liver disease] would be classified as a contributory disease" (R. 75). A more direct admission, bringing this case clearly within the ambit of the *Evans* case, cannot be immagined.

The *Evans* case has been repeatedly cited by our Supreme Court in approval, and was followed on this point in *Bennett vs. Metropolitan Life Ins. Co.,* 35 Wn. (2d) 284; 212 P. (2d) 790, where it was held:

> "That the evidence left no doubt that the death of the insured was contributed to by his tuberculosis and epileptic condition, as well as injury sustained from a fall, thereby placing the death outside the coverage of the double indemnity clause, and the Trial Court was justified in taking the matter from the jury and dismissing the case." (3rd Syl.)

Even if the discoloration under the jaw had been caused by the fall, the most that could be claimed for the appellant would be that it raised an issue of fact to be determined by the trier of the fact. Since the

Trial Judge determined the fact against appellant, that determination is controlling in this court. There are a number of cases to this effect, but we content ourselves with a quotation from the latest of them which cites the earlier cases.

In *Davis vs. North American Accident Ins. Co.,* 39 Wn. (2d), 145, 146; 234 P. (2d) 871, the Supreme Court of Washington said:

> "Normally it is most difficult to determine precisely or even to estimate the contribution of preexisting disease to an injury where the latter appears prima facie to have been the result of an accident. The question then presented is a purely factual one. Where there is conflicting evidence, the problem should be resolved by the trier of the facts. *Graham vs. Police and Firemens Ins. Assn.,* 10 Wn. (2d) 288; 116 P. (2d) 352; *Towey vs. N. Y. Life Ins. Co.,* 27 Wn. (2d) 829; 180 (2d) 815. See, also, *Bennett vs. Metropolitan Life Ins. Co.,* 35 Wn. (2d) 284; 212 P. (2d) 790."

2. Did Decedent Die of Natural Causes?

Appellant's second contention, based on the false assumption that appellant had made a prima facie case of death by violent and accidental means, which shifted the burden of proof to the appellee, consists of a statement that:

> "There is a complete failure to establish, by a preponderance of the evidence, that the deceased died of natural causes."

While the foregoing demonstrates that there was no such burden resting on appellee, the record does clearly disclose, by an overwhelming preponderance of the evidence, that the decedent did die of natural causes. The four physicians who unequivocally testied that in their judgment he died of natural causes, are nowhere contradicted on this point, save by a half hearted hypothesis of Dr. Hill, to be later discussed.

Dr. Kalez, who had treated the decedent as his physician for many years (R. 114-121), and who was first to be present when decedent's death was discovered, testified that "my conclusion was he died of natural causes." (R. 123); "death may occur from his natural causes suddenly and unexplainably without any minute findings" (R. 149).

On cross-examination by appellant's counsel, he gave the following further testimony:

> "Q. ***Wouldn't you conclude * that it is just as possible he slipped and fell and hurt himself and died as a result of that?
>
> "A. No, because the preponderance of the evidence is on the other side.
>
> "Q. *The cigarette,* right?
>
> "A. The *cigarette* — no evidence of external injury, sudden, acute rigor mortis ** the preponderance of opinion of both myself and the Coroner was that it was a natural death in view of the fact that there was nothing to substantiate any other cause." (R. 151-152).

Dr. Myhre, the second medical expert called by appellee, likewise testified unequivocally that "it was a natural death." (R. 161) He was followed by Dr. Stier, who gave exactly the same testimony (R. 180). Dr. Higgins, the Deputy Coroner, also testified that "My opinion was that it was a natural death." (R. 215).

Faintly opposed to this positive, unqualified testimony of these four physicians, there is only the uncertain, inconclusive testimony of Dr. Hill.

On cross-examination, Dr. Hill gave the following testimony:

> "Q. You came to the conclusion that you would have to speculate as to what was the cause of his death?
>
> "A. I would.
>
> "Q. And you certainly have expressed no opinion as to what caused it: if he fell, what caused the fall?
>
> "A. The only opinion I could possibly express there is that he might have fainted from his liver disease or something of that nature, but this is speculation." (R. 69)

Dr. Hill was appellant's only witness as to the cause of decedent's death. Of appellant's two other medical witnesses, Dr. Logan merely testified on the question of hypoglycemic shock, due to the fatty metamorphosis of decedent's liver, resulting from his

heavy drinking, and Dr. Kleaveland testified only in contradiction of Dr. Myhre's conclusion that the decedent's death was due to ventricular fillibration. Neither of them ventured any opinion as to the cause of the death of the decedent.

A clear distinction exists between this admittedly speculative opinion of Dr. Hill and the positive, unequivocal testimony of the four physicians mentioned above that the decedent's death was due to natural causes.

These several opinions of the four doctors that the death of the decedent was due to natural causes, that he was dead before his body struck the floor, were in no sense speculative. They were based on physical facts, i.e., the head in a cramped position when, if the decedent had been alive, as even Dr. Hill has admitted, the decedent would and easily could have struggled into a position readily permitting breathing (R. 69), the cigarette held in his hand, so moveless that it burned down to the filter with an inch of ash, wholly undisturbed by even the slightest movement in the hand (R. 196, 244-5); the fact that he fell crosswise in the bathroom when, if he had slipped as he entered the bathroom, he would have fallen forward or backward; the complete absence of any condition of the floor that could have caused the fall, etc. These were opinions based on observed physical facts, and there were no physical facts that in any way contradicted them.

The fall of decedent, sidewise, the narrow way of the bathroom, is highly significant as explained by Doctors Myhre and Stier. Dr. Myhre testified as follows:

> "Q. What is the natural reaction of the body when somebody dies suddenly like that? * * * (R. 17)
>
> "A. *** pitched forwards, backwards, sideways."
>
> "Q. Any way?
>
> "A. Any way."

And Dr. Stier, questioned on the same point, testified:

> "A. The body would fall in whatever position the death occurred." (R. 182)

This testimony not only explains the fall sidewise, but confirms the judgment of the physicians that the decedent was suddenly stricken and dead before the body reached the floor.

This conclusion that the decedent died of natural causes is further fortified by the physical condition of the decedent, suffering as he was from "a very marked and severe fatty change in the liver" (R. 59), "due to excessive drinking" (R. 73), as testified to by Dr. Hill.

Coupled with this was his abnormally high blood pressure (R. 115), as testified to by Dr. Kalez, his physician for the last eight years of his life (R. 114). In this eight-year period, the decedent's blood pressure in 1959 was 208/98 and 198/86 (R. 116); in 1961, it was 220/120 (R. 114) and in 1963, it was 224/128-32 (R. 118). This high blood pressure, like the fatty metamorphosis of the liver, was attributed to his heavy drinking (R. 120). Dr. Kalez further testified that high blood pressure "is in itself a disease" (R. 120) called "hypertension." These facts taken in consideration with the external, physical facts and the opinions of five of the six physicians testifying as to the cause of death, fully justified the Trial Court in finding (F of F No. 14):

> "The only unrefuted cause of death was from natural causes, i.e., a cerebral vascular accident."

True, there was a divergence of opinion among the physicians as to the particular disease that caused the death of decedent. But these opinions as to the particular disease are only secondary and derivative from the fact that he died of natural causes.

On this subject as to when testimony as to the cause of death or injury is speculative, in an often cited case, *Frescoln v. Puget Sound T. Co.,* (90 Wash. 59, 63; 155 Pac. 395), Judge Chadwick gave an opinion as to what many times has been accepted by the Supreme Court of Washington as a sound definition of such speculation when he wrote:

> "Speculation and conjecture, when used in this connection mean the same thing. The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another."

Judged by this test, the unanimous opinion of these physicians, based on these physical facts and ratified by the opinion of the Trial Judge, can in no sense be said to be speculative or conjectural. The only conjectural testimony on this point is that of Dr. Hill, who admitted frankly that he had to speculate as to the cause of the fall of the decedent. (R. 69).

Inasmuch as plaintiff's case rests entirely on the testimony of Dr. Hill, a more extended analysis of his testimony is in order.

Dr. Hill's strongest statement as to the cause of the death of decedent was given on direct, as follows:

> "It seems to me that it is more logical to assume that the death had actually been due to the obstruction of the airway." (R. 62)

However, on cross-examination, Dr. Hill whittled away this statement until practically nothing is left of it by the following admissions:

> "Q. Actually, you found no anatomical findings to indicate asphyxiation?
>
> "A. That is true, sir**"

"Q. Also, isn't it true, sir, that in the majority of cases you do find cyanosis?

"A. In the great number of them, you do, no question about it.

"Q. Actually, when it comes down to it, the only basis of your conclusion that there may have been asphyxation was the position of the body as described to you?

"A. Yes, in the absence of any visual findings that I could see that would cause the death.

"Q. Actually, in the great majority of the cases of asphyxation, there are convulsions, too, are there not?* * *

"A. In the great majority of them, yes." (R. 73, 74).

Continuing the cross-examination:

"Q. During this period of time, if the body were in a very awkward, uncomfortable strained position, the body would just naturally reflex itself out of it?

"A. There would certainly be an attempt to get up, I would think, at least if he is conscious.

"Q. I will ask you if you don't recall, on the 24th day of December, 1963 * *, if then at that time you didn't in your own handwriting state to him that in your opinion that liver disease was contributory to the death of Henry George?

"A. Yes, it would be classified as a contributory disease." (R. 74, 75).

Having in mind the provision of the policy that it only comes into effect "in the event the death of the insured resulted directly from injuries effected *solely* through external, violent and accidental means," this admission of Dr. Hill that his liver disease contributed to his death, is of itself fatal to the contention of the plaintiff, as we shall see when we examine the authorities on this point.

After these several admissions of Dr. Hill that the liver disease of the decedent was contributory to the death of Henry George (R. 75); that if his head were in such a position to cut off his breathing, there would "*certainly*" be an effort to rise from it or "reflex out of it," the only basis of his opinion that the death was due to the obstruction of the airway, was the awkward, strained position of the head.

What is left of Dr. Hill's assumption that death had been due to the obstruction of the airway of the decedent? What he has expressed — not as an opinion, but a mere assumption — is thoroughly contradicted and annulled by these later admissions of want of physical evidence to support the assumption.

Even so, Dr. Hill's tenuous assumption is overborne by the opinions of five other doctors on this point as to strangulation. Dr. Stier, being asked if it were possible for the decedent to have his wind-pipe cut off in that position replied:

> "I believe it would have been a remote possibility. I have not ever in my experience or reading found or heard of a case where strangulation occurred in such a position." (R. 185).

Dr. Myhre, being asked the same question, was even more emphatic:

> "I know of no conceivable way the neck can be extended or flexed and cut off an airway without fracturing or breaking the neck." (R. 164).

In response to a similar question on cross-examination, Dr. Kalez testified:

> "It would be almost impossible in a husky bull-necked fellow like that. If he had, he would have had convulsions prior to his death." (R. 145).

Dr. Higgins, the Deputy Coroner, in a much more extended exposition of his view, reached the same conclusion as Drs. Stier, Myhre and Kalez (R. 217-218), while Dr. Hubbard joined his four colleagues in testifying that the death of the decedent was not due to strangulation (R. 208-209).

This massive array of expert medical opinion completely overwhelms whatever was left of Dr. Hill's highly qualified assumption that the decedent's death was due to the "obstruction of the airways" (R. 64) and leaves no evidence on which appellant can rely that defendant's death was in any way due to violent or accidental means.

3. Appellant's Major Legal Contention

Under the heading of "Legal Issues and Authorities," on Pages 12-17 of Appellant's Brief, beginning with *Graham vs. New York Life Insurance Company,* 182 Wash. 612, 47 P. (2d) 1029, and ending with *Doke vs. United Pacific Ins. Co.,* 15 Wn. (2d) 536, 131 P. (2d) 436, great and quite unnecessary efforts are made by appellant to establish the rule that, once a prima facie case of death solely by external, violent and accidental means has been made by the plaintiff, the burden of proof then reverts to the defendants. But that is precisely the rule adopted by the Trial Court in this case. After noting that the law of Washington controls and is well established, and that there is no basic dispute between the parties as to the law, the Trial Judge wrote:

> "Where a claim is made by the beneficiary and rejected by the insurer on a double indemnity coverage such as is before us, the plaintiff has the burden initially of proving that the insured's death was caused by violent, external and accidental means. Upon a prima facie showing by the defendant in this regard, the burden shifts to the defendant to overcome the proof of death by violent, external and accidental means, or to prove the bar of some other exclusion under the policy." (Appendix A, this Brief).

There are just two vital reasons why these cases of appellant have no relevance. In the first place, appellant failed to prove that the insured's death was caused by violent, external and accidental means; and

in the second place, the appellee proved by an overwhelming preponderance of the evidence that the decedent died from natural causes.

4. Admissibility of Peter Dix's Opinion

On Pages 17-20 of Appellant's Brief, appellant urged that the Trial Court erroneously refused to admit the opinion of Peter Dix, a layman, as to "what happened to him (the decedent) at that time," *Graham v. Police and Firemen's Assn.*, 10 Wn. (2d) 288, 116 P. (2d) 352, and *Arthurs v. National Postal Trns. Assn.*, 49 Wn. (2d) 570, 304 P. (2d) 685, are cited in support of the right of the appellant to use this opinion of Peter Dix.

But these cases only support the admission of "information" when such "information is the result of *familiar association.*" Then, only, "the layman may testify to disposition, appearance and physical condition of an individual." But Peter Dix has already testified at considerable length; (R. 14-22) as to the disposition, appearance and physical condition of the decedent. His layman's opinion that was sought is indicated by the offer of proof (R. 23) that "it was his opinion that he had fallen * * * and:

> "was jammed in the bathroom in that position, and that his neck appeared to have been out of place or broke, and that he would suffocate because he could not breathe."

Here, there was plainly offered an invasion by a layman in the field of opinion that can only be given by an expert. His surmise that the neck was broken is, of course, altogether erroneous, and his opinion that decedent had suffocated had nothing to go on but the observation of the position of the body which he had given in full detail. Under these circumstances, the following cases and others that could readily be cited to the same effect would seem to be conclusive against the admission of such opinion:

In *Almanza vs. Phelps-Dodge Corp.,* 57 Ariz. 150 112 Pac. (2d) 215, it was held:

> "On the question whether disability resulted from injury rather than disease, medical testimony only is admissible."

Similarly, in *Griesel v. Fabian,* 184 Okla. 42, 84 Pac. (2d) 634, the rule was stated:

> "Where an injury is of such a character as to require skilled and professional men to determine the cause thereof, the question is one of science which must be proved by skilled and professional men."

See also *Cohenour v. Smart,* 205 Okla 668, 240 Pac. (2d) 91, 94.

Indeed, the Supreme Court of Washington said in *Orcutt v. Spokane County,* 58 Wn. (2d) 846, 364 P. (2d) 1102, at Page 853:

> "Medical testimony is *necessary* when the causal relationship is not clearly disclosed by substantial evidence." (Emphasis supplied.)

In any event, in the present case, the ruling on the offer of proof had no significant effect upon the outcome; for the fact is that, notwithstanding the court's ruling, the plaintiff succeeded by other questions in getting into the record the facts contained in his offer of proof. First, Mr. Dix's opinion that the decedent's neck "appeared to be dislocated or broken." (R. 20) and secondly, his opinion that the decedent's position was such that he could not breathe. (R. 20-21).

Furthermore, this proffered opinion of an untrained observer was wholly immaterial. In view of the massive expert testimony that decedent did not die of suffocation, and the medical reasons why suffocation could not take place, it is inconceivable that the Trial Court would or could have given any credence to this off-hand impression of Mr. Dix.

IV.

CONCLUSION

In closing we summarize:

Since no more has been shown in this case concerning the cause of death other than the finding of the dead body of decedent in his hotel bathroom, since there is no evidence that the decedent slippd or fell ac-

eidentally; since there is no evidence that the decedent met his death by external, violent or accidental means; since, on the contrary, the overwhelming conclusion of the expert medical testimony is that decedent met his death through natural causes; and since, finally, the Trial Court's findings, based on the preponderance of the evidence, fully sustains the foregoing summary of the evidence, it follows, we respectfully submit, that the judgment of the Trial Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Benjamin H. Kizer, one of the attorneys for the respondent states:

I certify that, in connection with the preparation of the within brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with these rules.

Benjamin H Kizer

Attorney for Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

SUE F. GEORGE,
Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, a Mutual Insurance Company,
Defendant.

NO. 2513

MEMORANDUM OPINION

This matter is before the court for determination on the merits following a trial to the court without a jury. Plaintiff appeared at said trial on November 19, 1964, represented by her attorneys, William B. Bantz and Michael Hemovich; defendant appeared by and through its attorneys, Benjamin H. Kizer and Robert E. Stoeve. Evidence was received, arguments and briefs have been submitted and the cause is fully presented.

The defendant, Henry S. George, was found dead, on or about June 24, 1963. in the bathroom of the hotel room in Spokane, Washington, where he made his home. At the time of his death there was in full force

and effect a life insurance policy on the life of the said Henry S. George, written by the defendant company. By the terms of said policy the plaintiff was beneficiary. The life policy was in the face of $50,000.00 with a so-called double indemnity rider calling for payment of an additional $50,000.00 to the beneficiary in the event the death of the insured "resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means . . . ".

It is undisputed that timely proof of death and proper claims for both the basic and the double indemnity coverage were made. The face amount of the policy, $50,000.00, was paid and the defendant refused payment of the accidental means death provision of the policy.

As it is shown in the pretrial order, duly entered in the cause, the issue presented by the contentions of the parties resolves down to the question of whether or not the insured died by external, violent and accidental means within the language of the insurance policy in question.

The Law of the State of Washington controls and appears well established. Actually there is no basic dispute between the parties as to the principles of law applicable to the sole issue presented in this cause. Where a claim is made by the beneficiary and rejected by the insurer on a double indemnity coverage such

as is before us, the plaintiff has the burden initially of proving that the insured's death was caused by violent, external and accidental means. Upon a prima facie showing by the plaintiff in this regard, the burden shifts to the defendant to overcome the proof of death by violent, external and accidental means or to prove the bar of some other exclusion under the policy.

The issue being narrowed and the applicable law clearly established, the relevant facts as established by the proof need to be stated:

The court finds from the evidence that the following facts have been proved:

(1) That the decedent's body was found from twelve to thirty hours after death in a cramped position in a bathroom; the body was in a state of extreme rigor mortis.

(2) There were no external marks of bruises or contusions of any kind indicating an injury. Some evidence of a blueness below the right jaw line was offered, but this was post mortem lividity and not a bruise.

(3) That a cigarette, burned to the filter or to the skin line, was discovered in the right hand of the corpse with an ash in place of a length slightly over an inch. It was stipulated that such ash would result

from a burning of the cigarette for a period of four to five minutes.

(4) Upon examination by physicians, the body showed no evidence of petechial hemorrhaging; no evidence of cyanosis and no evidence that convulsions had preceded death. No injury to the air passages was found. Some or all of these conditions are present in the majority of cases where there has been death by strangulation.

(5) An autopsy was performed on the cadaver some four days after the body was discovered, which was nearly five days after death. No anatomical cause of death could be ascertained by the pathologist performing the autopsy.

(6) The decedent had a history of high blood pressure, indicating the disease of hypertension. A common cause of death in hypertension cases is by circulatory vascular accident, that is, a rupture of a blood vessel.

(7) Because of the elapsed time between the death and the autopsy, post mortem autolysis had set in and the cells of the brain were so deteriorated as to cause microscopic examination of the brain cells to be valueless.

(8) The liver was the only bodily organ showing any significant pre-death malfunction. This organ

showed a marked, severe and diffuse fatty metamorphosis, probably due to longtime over-indulgence in alcohol by the decedent. In this disease, fatty substance infiltrates the liver cells and reduces the ability of the liver to store sugar needed to maintain the sugar level in the blood.

(9) There is no evidence that the decedent slipped or fell accidentally.

(10) A total of eight doctors testified to a total of four different possible causes of death; strangulation, hypoglycemic shock; cerebral vascular accident (stroke); and ventricular fibrillation. Each of such doctors admitted that the conclusion reached by him was the result of speculation. Insufficient physical evidence of the cause of death could be demonstrated by any doctor or doctors to establish with certainty the exact reason for the death of the insured decedent.

(11) The opinion of Dr. Hill, pathologist and principal medical witness for the plaintiff, that death was by strangulation, was based on a description of the position of the body given to him by Doctors Kalez and Higgins, each of whom viewed the body prior to its being moved. However, these two doctors, who viewed the body, stated that the air passages were not closed by the position of the body. In view of this fact, and the absence of any of the usual conditions present with strangulation deaths, Dr. Hill's conclusion of

strangulation is not based on a satisfactory premise and cannot be accepted.

(12) The deceased had eaten a meal shortly before death which was partially digested. This fact excludes the diagnosis of death by hypoglycemic shock and such diagnosis is unacceptable.

(13) Death, having its primary cause from ventricular fibrillation, under the proof, is purely a theoretical conjecture and the court discounts it.

(14) The only unrefuted cause of death was from natural causes, i. e., a cerebral vascular accident.

(15) The court finds that Henry S. George was dead or dying while still on his feet and in an erect position.

(16) There is no proof of death by external, violent or accidental means.

(17) The condition of the liver of the decedent did not substantially contribute to death.

The court concludes from the foregoing facts that the plaintiff has failed, initially, to prove that the insured died from violent, external and accidental means.

Further, the court concludes that the defendant has proved by a preponderance of the evidence that death

vas not caused by violent, external and accidental neans, and that, on the contrary, death was by natural auses.

The defendant must therefore prevail and the court o determines. Plaintif's complaint is to be dismissed nd judgment is to be for the defendant with its costs.

This memorandum opinion embodies the court's indings of fact and conclusions of law under Rule 52, 'ederal Rules of Civil Procedure. Either party may ubmit requests for other or more detailed findings s provided in said Rule.

The attorneys for the defendant will prepare and ubmit a judgment in accordance herewith.

DATED: December 7, 1964.

Ray McNichols
District Judge.